IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8380 of 1989
AND
SPECIAL CIVIL APPLICATION No 6361 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

In Special Civil Application No.8380 of 1989.
MAFATLAL FINE SPINNING & MFG. CO. LTD.
Versus
RAMACHHAR BENIMADHAV MISRA

In Special Civil Application No.6361 of 1989
MAFATLAL FINE SPINNING & MFG. CO. LTD.
Versus
HIRUBHAI RAGHUNATHAJI DESAI

Appearance:In Both the matters:
MR KS NANAVATI Sr.Advocate with Mr.Nandish Chudgar, Advocates for the Petitioner.

MR KG PANDIT for Respondent No. 1

CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 25/06/96

ORAL JUDGEMENT

1. Both these Special Civil Applications involve common questions of law and hence, they are decided by this common judgment and order.

2. The Special Civil Application No.8380 of 1989 is directed against the order dated 27th June,1989 passed by the Appellate authority under the Payment of Gratuity Act, 1972 at Surat in Appeal No.2 of 1989.

3. The undisputed facts are that the respondent herein was appointed as badli worker on 1-4-1958 with the petitioner-company. The respondent continued as such until he was made permanent from 1-4-1969. During the period of his working as badli workman from 1-4-1958 to 1-4-1969 he had worked for a period of 240 days in the year 1962 as also in the year 1968. The respondent retired on 1-3-1988 and in March, 1986 while working as a permanent employee his salary had crossed the limit of Rs.1500/- per month. The petitioner company paid the gratuity to the respondent for the period as under about which there is no dispute.

For the years 1962, 1968 and from 1-4-1969 to March, 1986.

4. The respondent claiming that he was entitled to the payment of gratuity for the entire period of his working as badli worker right from 1-4-1958 to 1-4-1969 approached the Controlling authority under the Payment of Gratuity Act, but the Controlling authority, Valsad rejected his Application no.86 of 1988 on 28th November, 1988. Against this order dated 28th November, 1988, passed by the Controlling authority under the Payment of Gratuity Act, 1972 at Valsad, an appeal was preferred under sec.7(7) by the respondent and this appeal was decided in his favour by the Appellate authority at Surat vide its order dated 27th June, 1989 and the same has been challenged by the petitioner-company through this Special Civil Application.

5. In Special Civil Application No.6361 of 1989, the respondent was appointed as badli worker on 1-8-1953 and was made permanent from 1-4-1958 and he retired on 1-3-1988. The impugned order passed by the Appellate authority shows that the respondent did not work for a period of 240 days in any of the years from 1953 to 1957

while he was working as badli worker. He had already been paid the gratuity for the period for which it was due in his favour after his becoming permanent from 1-4-1958. The respondent had moved an application before the Controlling authority under the payment of Gratuity Act, 1972 i.e. Application No.87 of 1988 claiming the gratuity even for the period when he was working as a badli worker and this application was rejected on 28th November, 1988 by the Controlling authority, Valsad. The respondent workman preferred an appeal against the order of the Controlling authority being Appeal No.1 of 1989 before the Appellate authority under the Payment of Gratuity Act, 1972 at Surat and this appeal was allowed on 27th June, 1989 by the Appellate authority and against this order dated 27th June, 1989, this Sp. Civil Application No.6361 of 1989 has been preferred. It may also be mentioned that C.A. No.1571 of 1990 with C.A. No.902 of 1990 in this Sp. Civil Application No.6361 of 1989 were disposed of on 17th September, 1990 and the interim relief granted therein had been vacated. The Registrar was directed to encash the fixed deposit receipt and redeposit the amount in the court. The respondent no.1 was granted liberty to withdraw the amount by furnishing the security to the satisfaction of the Registrar.

6. Mr.K.S. Nanavati, learned counsel appearing for the petitioner has submitted with reference to sec.4 and sec.2(A) of the Payment of Gratuity Act, 1972 that the Appellate authority has wrongly allowed the appeal inasmuch as the respondent was not legally entitled to the gratuity for the period when he had not completed 240 days of working in the concerned year before he was made permanent on 1-4-1969. He has also contended that the Appellate authority has failed to comprehend the correct import of the Supreme Court decision in Lalappa Lingappa V/s.Laxmi Vishnu Textile Mills, reported in A.I.R. 1981 SC Page, 852 and has taken the view contrary to the aforesaid decision of the Supreme Court by saying that the law laid down in A.I.R. 1981 SC, 852 was of no help to the petitioner-company in view of the subsequent amendment in the Payment of Gratuity Act, 1972 brought about in the year 1984 with effect from 11th February, 1981 in the definition of `continuous service' in sec.2(A).

7. On the other hand, Mr. K.G. Pandit, learned counsel appearing for the respondent has submitted that after the amendment of the definition of `continuous service', as per the amendment of 1984 with effect from

11th February, 1981, judgments in which the definition of `continuous service' as it was prior to this amendment, and the interpretation thereof by the Supreme Court cannot be of any aid to the case of the petitioner and the Appellate authority at Surat under the Payment of Gratuity Act, 1972 has rightly distinguished the case of Lalapps Lingappa V/s. Laxmi Vishnu Textile Mills (supra).

8. The only question which calls for consideration in this case is as to whether the respondent was entitled to the payment of gratuity for the period prior to his becoming permanent even in respect of those years in which he had not worked for 240 days because the gratuity has already been paid to him for the entire period after his becoming permanent till he did not exceed the upper limit of his salary of Rs.1500/-p.m. and had also been paid the gratuity for the years 1962 and 1968 in which he had worked for 240 days or more prior to his becoming permanent. In Lalappa Lingappa V/s. Laxmi Vishnu Textile Mills, the Supreme Court considered the grievances of permanent employees and also of those who were badli workers. The two questions which were considered by the Supreme Court in the case of Lalappa Lingappa V/s. Laxmi Vishnu Textiles Mills were as under:-

1. Whether permanent employees are entitled to payment of gratuity under sub-sec.1 of Sec.4 of the Act for the years in which they remained present without leave for a number of days in a year and had actually worked for less than 240 days, due to absence without leave?

2. Whether the badli employees are entitled to such gratuity on becoming permanent employees, for the badli period in respect of the years in which there was no work allotted to them, due to their failure to report to duty?

As stated in Para 4 of the Supreme Court judgment, these questions were in relation to the years in which these employees were not actually employed for 240 days in a year, due to their absence without leave.

9. In the aforesaid case of Lalappa Lingappa V/s. Laxmi Vishnu Textiles Mills, the Controlling autority in relation to the permanent employees had held that they were governed by the substantive part of the definition of `continuous service' in sec. 2(c) of the Act, upon the basis that there was no break in service i.e. there

was no question of their actual employment or actual working for 240 days or more. But with regard to badli employees, it was held that they were not entitled to gratuity in respect of those years in which they were not actually employed for 240 days since they fell within Explanation-1 of sec.2(c) of the Act. This view taken by the Controlling authority was affirmed by the Appellate authority and the High Court upheld the view of these authorities in respect of badlis, and reversed the decision of the Controlling and the Appellate authority with regard to the permanent employees on the ground that unauthorised absence from work results in break of service and, therefore, they were not in uninterrupted service and fell outside the substantive part of sec.2(c), but came within Explanation-1. It is against this decision of the Bombay High Court and the order which had been passed by the President of the Industrial Court, Bombay (Appellate authority under the Gratuity Act) that the controversy was taken to the Supreme Court in Civil Appeals no.436 and 930 of 1980 which was decided on 11th February, 1981 by the Supreme Court. The Supreme Court considered the provisions of sec.4(1) and sec.2(c) of the Payment of Gratuity Act, 1972 and the language of these provisions as considered by the Supreme Court are as under:

4(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,-

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease;

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement;

Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs.

Explanation.- For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement. The expression `continuous service' has been defined in Section 2(c) of the Act in these terms:

2 (c) "continuous service" means uninterruped

service and includes service which is interrupted by sickness, accident, leave, lay-off, strike or a lock-our or cessation of work not due to any fault of the employee concerned, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act.

Explanation I - In the case of an employee who is not in uninterrupted service for one year, he shall be deemed to be in continuous service if he has been actually employed by an employer during the twelve months immediately preceding the year for not less than -

(i) 190 days, if employed below the ground in a mine, or
(ii) 240 days, in any other case, except when he is employed in a seasonal establishment.

Explanation II - An employee of a seasonal establishment shall be deemed to be in continuous service if he has actually worked for not less than seventy five per cent of the number of days on which the establishment was in operation during the year.

10. The Supreme Court considered that Sub-section 1 of section 4 of the Act incorporates the concept of gratuity being the reward for long, continuous and meritorious service and the emphasis is not on `continuity of employment' but on rendering of `continuous service' and the two explanations were meant to extend the benefit to employees who are not in uninterrupted service for one year subject to the fulfilment of the conditions laid down therein. It is by legal fiction that an employe is deemed to be in, `continuous service' for purposes of Sub-section 1 of section-4 of the Act and that it was never the intention of the legislature that the expression, `actually employed' in Explanation I and the expression `actually worked' in Explanation-II should have two different meanings because it wanted to extend the benefit to the employee who `works' for a particular number of days in a year in either case. The Supreme Court accordingly held that the High Court was right to observe that in Explanation-I, the legislature had used the words `actually employed' and if it was contemplated by Explanation-I that it was sufficient that there was an subsisting contract of employment, then it was not necessary for the legislature to use the words `actually employed' and the expression `actually employed' in Explanation-I to Section-2(c) of the Act must, in the context in which it appears, mean `actually worked'. On this premises, it was held that the High Court was right

in holding that the permanent employees were not entitled to payment of gratuity under Sub-section 1 of section-4 of the Act for the years in which they remained absent without leave and had actually worked for less than 240 days in a year. Thus, so far as the permanent employees are concerned, the Supreme Court found that the permanent employees who had remained absent without leave and had worked for less than 240 days in a year are not entitled to gratuity for that year.

11. Regarding badli employees, it goes without saying that their service is interrupted service and they do not fall within the substantive part of the definition `continuous service' in section-2(c), but were covered by Explanation I. While referring to Delhi Cloth and General Mills Co. V/s. Its Workmen, reported in AIR 1970 SC 919, the Supreme Court in Lalappa Lingappa's case observed with regard to badli employees that the condition requiring the badli employees that they should have worked for not less than 240 days in a year to qualify for gratuity was not unjust. The Supreme Court also referred to the report of the Badli Labour Enquiry Committee, Cotton Textile Industry, 1967, that the badli employees are an integral part of the textile industry and that they enjoy most of the benefits of the permanent employees; but there may not be any continuity of service in their case as observed in Delhi Cloth Mills' case (supra). The Supreme Court has held that the badli employees are nothing but the substitutes. They are like `spare men' who are not `employed' while waiting for a job. The Supreme Court has also recorded that Conlon v. Glasgow, 36 Scott LR 652. Vallabhdas Kanji (P) Ltd. v. Esmail Koya, 1978 Lab IC 809 (Kerala) taking the contrary view does not appear to lay down the good law on the basis of the reasoning as aforesaid. The Supreme Court upheld the view that the badli employees were not covered by the substantive part of the definition of `continuous service' in section 2(c) but came within Explanation-I and, therefore, are not entitled to payment of gratuity for the badli period i.e. in respect of the years in which there was no work allotted to them due to their failure to report to duty.

12. It appears that after the aforesaid judgment of the Supreme Court, the Payment of Gratuity Act was sought to be amended in the year 1984 by Act No.26 of 1984 with effect from 11th February, 1981 i.e. the date on which the Supreme Court judgment was rendered in the case of Lalappa Lingappa V/s. Laxmi Vishnu Textile Mills, and the definition of `continuous service' under sec. 2(c) and the meaning of `continuous service' under sec. 2A

are as under:

2(c) "continuous service" means continuous service as defined in Sec. 2-A;

2-A. Continuous service.- For the purposes of this Act,-

(1) an employee shall be said to be in continuous service for a period if he has, for that period, been in uninterruped service, including service which may be interruped on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order [* * *] treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), lay-off, strike, or a lock-out or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commence of this Act ;

(2) where an employee (not being an employee employed in a seasonal establishment) is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer -

(a) for the said period of one year, if the employee during the period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than -

(i) one hundred and ninety days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week ; and

(ii) two hundred and forty days, in any other case ;

(b) for the said period of six months, if the employee during the period of six calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than -

(i) ninety-five days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six

days in a week ; and

(ii) one hundred and twenty days, in any other case :

[Explanation - For the purposes of Clause (2), the number of days on which an employee has actually worked under an employer shall include the days on which -

(i) he has been laid-off under an agreement or as permmited by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under the Industrial Disputes Act, 1947 (14 of 1947), or under any other law applicable to the establishment ;

(ii) he has been on leave with full wages, earned in the previous year ;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment ; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.]

(3) where an employee, employed in a seasonal establishment, is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer for such period if he has actually worked for not less than seventy-five per cent of the number of days on which the establishment was in operation during such period.

13. If the effect of this amendment is to be considered on the view which had been taken by the Supreme Court in Lalappa Lingappa's case, it appears that through this amendment, what was denied to the permanent employees on account of their working for a period of less than 240 days in a year by remaining absent from duty without leave, has been granted so as include such period for the purposes of continuous service and thus, the benefit which stood denied to the permanent employees was taken care of in terms of the amended section 2-A and now even the period of absence without leave in case of permanent employee has to be treated as a part of continuous service for the purposes of payment of

gratuity under section 4 of the Act. However, the case of badli employees is covered under section 2A(2)(a)(ii) for the purpose of continuous service and badli worker is an employee, who is not in a continuous service within the meaning of clause (1) of section 2-A and he is to be deemed to be in continuous service under the employer only if he has worked for not less than 240 days and therefore, the amendment of sec. 2-A does not enure any benefit in favour of the badli employees because they are still not covered by the substantive part of the definition of `continuous service'. There is no question of their absence from duty without leave because they are required to render the service only when the job is available for them and as has been dealt with by the Supreme Court they are working only as `spare men' who can't even said to be employed while they are waiting for a job. It is therefore clear that despite the amendment of section 2-A with regard to the continuous service, the legal position in respect of the badli employees for the purpose of claiming gratuity remains the same so much so that even the definition of badli as per the standing orders applicable to the employees of the petitioner company are in peri materia with the definition of badli as has been considered by the Supreme Court in the aforesaid judgment of Lalappa Lingappa Vs. Laxmi Vishnu Textile Mills. Both the definitions are as under:-

Badli as considered in Lalappa Lingappa`s case.

A "badli" is one who is employed on the post of a permanent operative or probationer who is temporarily absent.

Badli as per the standing orders applicable to the present petitioner company and its employees.

A badli is

one who is employed on the post of a permanent operative or probationer who is temporarily absent.

14. Thus, I have no hesitation in holding that the Appellate authority wrongly allowed the appeal of the respondent on the basis that after the amendment of 1984 in the Payment of Gratuity Act, the decision rendered by the Supreme Court in Lalappa Lingappa's case was of no avail to the petitioner. So far as the badli employees are concerned, the Supreme Court decision in Lalappa Lingappa's case holds the field and the legal position with regard to the term of continuous service applicable to the badli employees remains the same and it is

necessary for the badli employees to have completed 240 days of service in a given year prior to his becoming permanent so as to be entitled for gratuity for that period.

15. In the result, both these Special Civil Applications must succeed and are accordingly allowed. The impugned order passed by the Appellate authority on 27th June, 1989 in each of these two Special Civil Applications are hereby quashed and set aside and the orders dated 28th November, 1988 passed by the Controling authority in each of these two matters are hereby restored. It has been given out by Mr. Nanavati that in Special Civil Application No.6361 of 1989, a sum of Rs.4717-50 which had been deposited under Court's order has already been withdrawn by the respondent workman and looking to the petty amount, the petitioner by way of concession and grace would not recover this amount from the respondent and the same course of action shall also be followed in Sp. Civil Application No.8380 of 1989 wherein a sum of Rs.8044-65 has been deposited under Court's order. Mr. Nanavati has stated that the petitioner does not press for the return of this amount, on the contrary, looking to the petty amount involved in this case, by way of concession and grace he has no objection even if this amount of Rs.8044-65 deposited by the petitioner in Special Civil Application No.8380 of 1989 is withdrawn by the respondent alongwith the interest. Ordered accordingly. Rule is made absolute in the aforesaid terms in both these matters. No order as to costs.
